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District Court: 81 Federal Supplement 647.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

EUGENE PRESTON BROWN

SPECIAL APPEARANCE AND BRIEF OF EUGENE PRESTON BROWN CONTESTING JURISDICTION.

I

DEFECTS OF PROCEDURE

The judgment of the Court of Appeals was entered June 16. The time for filing a petition for certiorari expired September 14, except that an order of extension appears to have been granted September 13.

The application for the September 13 order of extension was ex parte. No notice was given prior to the mailing of a letter from Washington October 7. No reason or explanation was ever given why the extension was sought.

These defects are jurisdictional.

(1)

Furthermore, tacit approval of such procedure will be withheld if certiorari is denied.

Pages 143 to 145 of the Court of Appeals record have not been served on me. I do not know and have never known what is contained in those pages.

II

ABSENCE OF JURISDICTION OVER SUBJECT-MATTER

The Supreme Court has no jurisdiction to grant certiorari in a habeas corpus case from a judgment of a Court of Appeals of the United States that orders the discharge of a prisoner, or affirms an order of discharge granted by a District Court.

(It is assumed that an order refusing or granting certiorari is not necessarily based upon a ruling upon this issue.)

In England the custodian in a habeas corpus case cannot appeal, according to the House of Lords, which regards this as fundamental.

COX v. HAKES (1890) L.R. 15 App. Cas. 506,
17 Cox, C.C. 158, 60 L.J.Q.B.N.S. 89,
63 L.T.N.S. 392, 39 Week Rep. 145,
54 J.P. 820.

To the same effect:

REX v. THORNTON (1915) 9 Alberta L.R. 163,
30 D.L.R. 441, 26 Can. Crim. Cas. 120,
34 West L. Rep. 178.

RE TIDERINGTON (1912) 17 B. C. 81, 5 D.L.R. 138.

RE BLAIR (1891) 23 N.S. 225.

See LONDON'S CASE (1609) 8 Coke, 121 b,
72 Eng. Reprint 658.

Unless the statute provides for appeal, there is no appellate jurisdiction.

CARPER v. FITZGERALD, 121 U.S. 87.

Section 2253 of Title 28 of the New Judicial Code provides for appeal only as far as the Court of Appeals. That decides the point. There is no jurisdiction in this court. Section 463(c) of the old Title 28 was not carried over into Section 2253 of the new Title 28. Supreme Court Rule 45 related to the old Section 463(c).

If it be argued that Section 1254 affords a remedy, the argument is unsound because the particular statute relating to habeas corpus is 18 USCA 2253.

Under the House of Lords decision of COX v. HAKES, *supra*, the nature of habeas corpus excludes appeal where release has been ordered. Habeas corpus as thus defined is the remedy protected by the United States Constitution, Article I, Section 9. Suspension of the writ by allowing appeals is as bad as suspension by delaying the writ while the court is in vacation, and that is clearly forbidden by the Habeas Corpus Act of 1691 and therefore by the Constitution.

The great weight of authority in this country is that a decision in a habeas corpus case in favor of the prisoner cannot be appealed. Jurisdiction is lacking in the appellate court.

STATE v. TOWERY, 143 Ala. 48, 39 Sou. 309
(1904).

RE ZANY, 164 Calif. 724, 130 Pac. 710 (1913).

See MARTIN v. DISTRICT COURT, 37 Colo. 110,
119 Am. St. Rep. 262, 86 Pac. 82 (1906).

RE TAYLOR, 3 McArth. 426 (1879).

GAGNET v. REESE, 20 Fla. 438 (1884).

HAMMOND v. PEOPLE, 32 Ill. 446, 83 Am. Dec.
286 (1863).

WALLACE v. CLEARY, 5 Ill. App. 384 (1879).

MAGERSTADT v. PEOPLE, 105 Ill. App. 316
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SKINNER v. SEDGBEER, 8 Kan. App. 624, 56
Pac. 136 (1899).

RE COSTON, 23 Md. 271 (1865).

PEOPLE v. COVANT, 59 Mich. 565, 26 N.W.
768 (1886).

PEOPLE v. FAIRMAN, 59 Mich. 568, 26 N.W.
769 (1886).

EX PARTE JILZ, 64 Mo. 205, 27 Am. Rep. 218,
2 Am. Crim. Rep. 217 (1876).

RE WHICKER, 187 Mo. App. 96, 173 S.W. 38
(1915).

See STATE v. SIMMONS, 112 Mo. App. 535,
87 S. W. 35 (1905).

EUREKA COUNTY BANK HABEAS CORPUS
CASE, 35 Nev. 80, 126 Pac. 655, 129 Pac.
308 (1912).

NOTESTINE v. ROGERS, 18 N.M. 462, 138 Pac.
207 (1914).

RE QUINN, 2 App. Div. 103, 37 N.Y.S. 534,
152 N.Y. 89, 46 N.E. 175 (1897).

WALTON v. GATLIN, 60 N.C. (1 Winst. L) 318
(1864).

STATE v. MILLER, 97 N.C. 451, 1 S.E. 776 (1887).

RE WILLIAMS, 149 N.C. 436, 22 LRA (NS) 238,
63 S.E. 108 (1908).

EX PARTE JOHNSON, 1 Okla. Cr. 414, 98 Pac.
461 (1908).

VANVABRY v. STATON, 88 Tenn. 334, 12 S.W.
786 (1889).

MEAD v. METCALF, 7 Utah 103, 25 Pac. 729
(1891).

RÉ BARBER, 56 Vt. 1 (1884).

As a matter of statutory interpretation, and as a matter of constitutional law, and according to the great weight of American authority, this court has no jurisdiction of this case.

The financial burden upon a person wrongfully imprisoned becomes oppressive if he must run the procedural gauntlet to the highest court and become a guinea pig for the convenience of other prisoners and the departments of

government. The orthodox British and American rule, partially restored by 28 USCA 2253, is sound.

(Note: Corrections in regard to statement of the case are in Appendix.)

- Respectfully submitted,

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 Attorney for
 Eugene Preston Brown
 Appearing specially,
 not admitting jurisdiction
 but contesting it.

CERTIFICATE OF SERVICE

I, Walter G. Cooper, certify that I have mailed five copies of the foregoing special appearance and brief to Philip B. Perlman, Esquire, The Solicitor General, Department of Justice, Washington, District of Columbia, in an envelope duly stamped and sealed, this the day of November, 1949.

Attorney for Eugene Preston Brown

APPENDIX

CORRECTIONS TO STATEMENT OF THE CASE

Petition for certiorari, page 2, lines 6-12: The appointing authority did not purport to determine whether an officer of the Judge Advocate General's Department was available for the purpose of serving as Law Member. Instead, he totally disregarded this point and the requirement of the 8th Article of War. (Court of Appeals record 108, 137.)

Petition for certiorari, page 2, lines 13-17: The errors and irregularities constituted a denial of due process.

Petition for certiorari, page 4: The prisoner also alleged (1) Due process was denied, in various particulars. (2) There was no scintilla of evidence of malice or premeditation. (3) Reviews were insufficient to comply with the indispensable requirements of the statute. (CA record 4-16.)

Petition for certiorari, page 5, lines 19-26: Captain Chalkley could not have been excused from duties as Law Member, for his duties were not those of Law Member but of Assistant Trial Judge Advocate. This also applies to petition for certiorari, page 10, footnote 4.

Petition for certiorari, page 6, footnote 3: We never contended that Captain Royston was an officer of the Judge Advocate General's Department. The officers who were members of that Department and were available were

Captain Chalkley and Captain Sams. (Transcript in this court, page 22).

Petition for certiorari, page 8, lines 6-15: The appointing authority did not purport to exercise a discretion but totally disregarded the requirement of the 8th Article of War. Terming the decisions below a review is confusing. The errors and irregularities constituted a denial of due process which ousted jurisdiction.